Supreme Court, U.S.
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80-745

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

ORIENTAL STEAMSHIP CORPORATION,
Petitioner,

VS.

WILLIAM V. MCMICHAEL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the
United States Court of Appeals
for the Ninth Circuit

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QUESTION PRESENTED

The question presented is whether the standard announced in *Santos v. Scindia Steam Navigation Co.*, 598 F.2d 480 (9th Cir. 1979), *cert. granted, Scindia Steam Navigation Co. v. De Los Santos* (No. 79-512) should be applied to require the shipowner to view the occurrence of an ephemeral, known and obvious tripping hazard during a stage of a customary loading operation as an unreasonable risk of harm and therefore to prescribe a change in the usual method of stowage where the stevedore makes no objection nor proposal for change.

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PETITION FOR A WRIT OF CERTIORARI
to the
United States Court of Appeals
for the Ninth Circuit

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, first entered in this case June 25, 1980, as to which rehearing was denied August 13, 1980.

OPINIONS BELOW

The United States District Court for the Western District of Washington rendered no opinion. The memorandum opinion of the United States Court of Appeals for the Ninth Circuit is set forth in Appendix I.

JURISDICTION

On June 25, 1980, the Court of Appeals entered its judgment (Appendix III) affirming the order of the District Court (Appendix II), denying the petitioner's motions for a directed verdict and for judgment notwithstanding the verdict. A petition for rehearing was timely filed July 9, 1980, and was denied on August 13, 1980 (Appendix IV). The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

STATUTE INVOLVED

Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972, 33 U.S.C. section 905(b):

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the

warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

STATEMENT OF THE CASE

Plaintiff is a longshoreman who filed this action within the diversity jurisdiction of the United States District Court for the Western District of Washington to recover damages, in addition to his workers' compensation benefits, for injuries he sustained aboard petitioner's ship, the GOLDEN ROD, in November 1973.

The stevedore company was preparing to load logs on the ship's hatch covers. Without any objection or proposal for change,[1] the longshoremen followed the customary practice on vessels such as the GOLDEN ROD: they placed tarpaulins over the pontoon hatch covers to prevent water from leaking into the holds; plywood and cargo nets were then placed over the tarpaulins to protect them from the loads of logs placed over the hatches.[2] While placing tarpaulins on the No. 2 hatch, plaintiff tripped over a cargo net which the longshoremen had already spread over the No. 3 hatch, injuring his knee.[3]

The District Court denied petitioner's motions for a directed verdict at the close of plaintiff's case and at the conclusion of the evidence,[4] and the jury returned a verdict for plaintiff.[5] Petitioner timely filed a motion for new trial[6] and a motion for

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[1]Transcript at 347. See also Transcript at 321, 322, 335, 336.

[2]Brief of Appellee (longshoreman) in the Court of Appeals at 1-2.

[3]Brief of Appellee (longshoreman) in the Court of Appeals at 3; Transcript at 138.

[4]Transcript at 304, 367.

[5]Record at 145, 146; see Judgment of District Court, Appendix V.

[6]Record at 151.

judgment notwithstanding the verdict,[7] which were denied (Appendix II).

The Court of Appeals, in a Memorandum Opinion, affirmed the lower court's denial of petitioner's motions for a directed verdict and for judgment notwithstanding the verdict (Appendix I), upon the authority of its decision in *Santos v. Scindia Steam Navigation Co.*, 598 F.2d 480 (9th Cir. 1979), *cert. granted, Scindia Steam Navigation Co. v. De Los Santos* (No. 79-512). The shipowner's subsequent petition for rehearing was denied (Appendix IV).

REASONS FOR GRANTING THE WRIT

The Writ of Certiorari should be granted because the Court of Appeals has:

1. Rendered a decision in this case in conflict with decisions on the same matter of five other courts of appeals, those of the Second, Third, Fourth, Fifth and Seventh Circuits, and

2. Decided an important question of federal law which has not been settled by this Court, but is presently under review on writ of certiorari in *Scindia Steam Navigation Co. v. De Los Santos* (No. 79-512).

Background of the Question

The issue here arises under 33 U.S.C. section 905(b), a subsection enacted in 1972 as one of the major reforms of the Longshoremen's and Harbor Workers' Compensation Act. By its provisions Congress eliminated unseaworthiness as a ground of recovery by the longshoreman against the vessel and restricted his recovery to an action for negligence, under new conditions furthering the policy of the Act. The legislative history, supported by court decisions since, shows that the new action for

[7]Record at 147.

negligence is to be uniform throughout the country[8] so as to "place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore".[9] The announced policy of the changes made was to establish a fully adequate system of compensation benefits[10] and thus assure that the employer (who ordinarily has the best opportunity to promote safety)[11] "bears the cost of unsafe conditions . . . [so as] to strengthen the employer's incentive to provide the fullest measure of on-the-job safety"[12] and reduce reliance upon suits against vessels.[13] More particularly it was stated that "a vessel shall not be liable . . . for the manner or method in which stevedores or employees of stevedores . . . perform their work".[14]

The courts, in order to effectuate the clear policy of the Amendments, began a quest to find in traditional non-maritime sources a suitable definition of the limited circumstances, if any, in which the shipowner should shoulder burdens of preparation, supervision and oversight for the safety of the longshoremen working aboard under the actual control of their stevedore employer. This process has culminated in this Court's grant of certiorari in *Scindia Steam Navigation Co. v. De Los Santos* (No. 79-512), where the question of the duty owed by a ship-

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[8]S. Rep. 92-1125, 92nd Cong., 2d Sess. 12; H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., *reprinted in* [1972]U.S. Code Cong., & Ad. News 4698, 4705.

[9]*Ibid*; "The Committee intends . . . that the vessel shall not be liable . . . unless it is proven to have acted or have failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances." S. Rep., *supra* note 6, at 11; H.R. Rep., *supra* note 6, at 4704.

[10]S. Rep., *supra* note 8, at 2, 5; H.R. Rep., *supra* note 6, at 4699, 4700.

[11]Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315 (1964).

[12]S. Rep., *supra* note 8, at 2; H.R. Rep., *supra* note 6, at 4699.

[13]*See* S. Rep., *supra* note 8, at 4.

[14]S. Rep., *supra* note 6, at 10; H.R. Rep., *supra* note 6, at 4703.

owner to a longshoreman has been briefed and will presumably be decided.

The Conflicts

The courts of appeals have enunciated three principal expressions of the standard of care: a number of decisions apply sections 343 and 343A of the Restatement (Second) of Torts, giving effect to the provisions of section 343A with respect to known or obvious conditions by expecting that the stevedore's supervisors and safety organization might be relied upon to discover and cope with such conditions;[15] a second group of decisions declines to impose the duty of supervision upon the vessel where it is shown that the shipowner has relinquished full control of the situation to the stevedore;[16] another group of cases, quite analogous to the last one, reaches substantially the same result by explicit resort again to the Restatement (Second) of Torts, this time to sections 409 and 414 dealing with the duties retained by those who employ independent contractors.[17]

Although there is conflict in detail among the three groups of cases just described, the same results will probably be reached in most cases under any of these standards. More im-

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[15]*See, e.g.*, Giglio v. Farrell Lines, Inc., 613 F.2d 429 (2d Cir. 1980); Chavis v. Finnlines, Ltd., 576 F.2d 1072 (4th Cir. 1978); McCullough v. S/S Coppename, 608 F.2d 208 (5th Cir. 1979); Clemons v. Mitsui O.S.K. Lines, Ltd., 596 F.2d 746 (7th Cir. 1979). For additional cases, see Brief of Petitioner at 18, Scindia Steam Navigation Co. v. De Los Santos, No. 79-512 on writ of certiorari.

[16]*See, e.g.*, Lubrano v. Royal Netherlands Steamship Co., 622 F.2d 29 (2d Cir. 1980); Hurst v. Triad Shipping Co., 554 F.2d 1237 (3d Cir. 1977); Roberts v. Andrew Martin Sea Services, Inc., No. 78-2219 (5th Cir. May 30, 1980); Wescott v. Impresas Armadoras, S.A., 564 F.2d 875 (9th Cir. 1977). For additional cases, see Brief of Petitioner at 19, Scindia Steam Navigation Co. v. De Los Santos, No. 79-512, on writ of certiorari.

[17]*See, e.g.*, Ruffino v. Scindia Steam Navigation Co., 559 F.2d 861 (2d Cir. 1977); Rich v. U.S. Lines, Inc., 596 F.2d 541 (3d Cir. 1979). For additional cases, see Brief of Petitioner at 19, Scindia Steam Navigation Co. v. De Los Santos, No. 79-512 on writ of certiorari.

portant than their differences is what they have in common: recognition of the need for reasonable limitations upon the circumstances when the shipowner must undertake an active duty of care for the safety of the longshoreman. The decision of the court below, relying upon its earlier decision in *Santos v. Scindia Steam Navigation Co.* to express the shipowner's duty of care to a longshoreman, conflicts with those decisions in its failure to restrict reasonably the owner's liability for work methods under the exclusive control of the longshoreman's stevedore employer. These Ninth Circuit decisions require a vessel owner to actively supervise and direct the work methods of the expert and experienced stevedore contractor in order to avoid liability.

Importance of the Question

The question is important for several reasons. First, the legislative history indicates a number of policy considerations which must be given effect under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, such as increased reliance upon the predictability, regularity and adequacy of compensation benefits, the promotion of safety, and the reduction of economic loss through legal proceedings. Careful interpretation of the Act in light of these policy considerations is necessary. Second, this question of a vessel owner's duty of care to a longshoreman frequently arises, as demonstrated in the numerous appellate court decisions cited and referred to above, with differing and often contradictory results. The decision in this case, relying as it does on *Santos v. Scindia Steam Navigation Co.*, vastly increases the scope of a shipowner's duty of care to the stevedore's employees. Such a holding has a dramatic effect on shipowners, stevedore companies, and the Congressional aims of the 1972 Amendments. If the shipowner is to be held liable virtually vicariously for a failure to supervise the judgment of the expert and experienced independent stevedore contractor in safety matters, drastic burdens have been im-

posed on the shipowner.[18] Such a situation calls for scrutiny by this Court to determine whether the goals of the 1972 Amendments have been implemented or frustrated.

RELATED CASES

The question raised by this case is the same as that raised in *Scindia Steam Navigation Co. v. De Los Santos*, No. 79-512 on writ of certiorari. Petitions for certiorari are currently pending in numerous other cases in which the question raised is the same or substantially similar.[19]

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[18]*See* Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979).

[19]Bachtel v. Mammoth Bulk Carriers, Ltd., 605 F.2d 438 (9th Cir. 1979), No. 79-538 on petition for certiorari; Matthews v. Ernst Russ Steamship Co., 603 F.2d 676 (7th Cir. 1979), No. 79-624 on petition for certiorari; Clemons v. Mitsui O.S.K. Lines, Ltd., 596 F.2d 746 (7th Cir. 1979), No. 79-706 on petition for certiorari *sub nom*. McCulley v. Mitsui O.S.K. Lines, Ltd.; Stockstill v. Gypsum Transportation, 607 F.2d 1112 (5th Cir. 1979), No. 79-1240 on petition for certiorari; Sarauw v. Oceanic Navigation Corporation, 622 F.2d 1168 (3d Cir. 1980), No. 80-245 on petition for certiorari; Griffith v. Wheeling-Pittsburgh Steel Corp., 610 F.2d 116 (3d Cir. 1979), No. 79-813 on petition for certiorari *sub nom*. American Commercial Lines, Inc. v. Griffith; Compania Maritime Navegacion Netumar, S.A., v. Irizarry (2d Cir. 1980), No. 80-94 on petition for certiorari; Johnson v. A/S Ivarans Rederi, 613 F.2d 334 (1st Cir. 1980), No. 79-1587 on petition for certiorari.

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should grant a writ of certiorari to review the decision of the Court of Appeals.

Respectfully submitted,

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Appendix I

In The United States Court of Appeals
For The Ninth Circuit

WILLIAM W. McMICHAEL, Appellee, v. GOLDEN ROD SHIPPING, INC., et al., Appellant.	No. 78-2748 MEMORANDUM

[June 25, 1980]

Before: WRIGHT, SKOPIL, and SCHROEDER, Circuit Judges.

Golden Rod appeals the orders of the district court denying its motions for a directed verdict and for judgment notwithstanding the verdict. We affirm.

A motion for a directed verdict or for judgment n.o.v. should be granted only when the evidence, viewed in the light most favorable to the nonmoving party, can support only the conclusion that the moving party is entitled to judgment. *Davison v. Pacific Inland Navigation Co.*, 569 F.2d 507 (9th Cir. 1978).

McMichael presented evidence at the trial that alternative means of securing the hatch covers were available to Golden Rod. These means would have been safer for the longshoremen loading the vessel.

Golden Rod presented evidence that improperly secured hatch covers might lead to a vessel's sinking. It presented no evidence that the alternative means of securing hatch covers proposed by McMichael would be inadequate to prevent such an occurrence.

Under the standard of negligence adopted by this circuit for purposes of actions brought under 33 U.S.C. § 905(b), the ultimate determination remains one of reasonable care. *Santos v. Scindia Steam Navigation*, 598 F.2d 480 (9th Cir. 1979), *cert. granted* May 1980. In the face of conflicting evidence this determination is one of fact.

The evidence supported a reasonable conclusion that the use of netting was unreasonable under the circumstances and in light of the available alternatives. The matter was properly left to the jury.

AFFIRMED.

Appendix II

United States District Court
Western District Of Washington
At Seattle

WILLIAM V. McMICHAEL, Plaintiff, vs. GOLDEN ROD SHIPPING, INC., a foreign corporation, and Unknown Owners, Charterers, Operators, and Agents of the M/V GOLDEN ROD, Defendants.	No. C76-658V ORDER

[May 9, 1978]

Donald S. Voorhees, D.J.:

Having considered defendants' motion for judgment notwithstanding the verdict or alternatively for a new trial, the Court now finds and rules as follows:

1. The Court finds that defendant Oriental Shipping Corporation has not shown good cause as to why judgment should be entered in this cause notwithstanding the verdict nor why a new trial should be ordered in this cause.

2. The Court finds that there was sufficient evidence in the record to sustain the verdict of the jury.

Accordingly, the motion of defendant Oriental Shipping Corporation for judgment notwithstanding the verdict or alternatively for a new trial is DENIED.

The Clerk of this Court is instructed to send uncertified copies of this order to all counsel of record.

Appendix III

In The United States Court of Appeals
For The Ninth Circuit

WILLIAM W. McMICHAEL, Plaintiff-Appellee, v. GOLDEN ROD SHIPPING, INC., et al., Defendants-Appellants.	No. 78-2748 JUDGMENT

[June 25, 1980]

APPEAL from the United States District Court for the Western District of Washington (Seattle):

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Seattle) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Appendix IV

In The United States Court of Appeals
For The Ninth Circuit

WILLIAM W. McMICHAEL, Appellee, v. GOLDEN ROD SHIPPING, INC., et al., Appellant.	No. 78-2748 ORDER

[August 13, 1980]

Before: WRIGHT, SKOPIL, and SCHROEDER, Circuit Judges.

The petition for rehearing is denied.

Appendix V

United States District Court
For The
Western District Of Washington

WILLIAM V. McMICHAEL,
vs.
GOLDEN ROD SHIPPING, INC.,
a foreign corp., et al.

No. C76-658V
JUDGMENT

[April 7, 1978]

This action came on for trial before the Court and a jury, Honorable DONALD S. VOORHEES, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, in favor of the plaintiff in the amount of $187,500.00.

It is Ordered and Adjudged that the plaintiff, William V. McMichael, is awarded damages in the amount of $187,500.00 and that Judgment be entered against Oriental Shipping Corporation for that amount.

supplemental brief

APR 20 1981
ALEXANDER L. STEVAS
CLERK

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ORIENTAL STEAMSHIP CORPORATION,
Petitioner,

vs.

WILLIAM V. McMICHAEL,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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ORIENTAL STEAMSHIP CORPORATION,
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VS.

WILLIAM V. MCMICHAEL,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

This brief is submitted to set the case in the light of the Court's teachings in *Scindia Steam Navigation Co. v. De Los Santos,* No. 79-512 (April 21, 1981).

In that case the Court has held that the ship owner has no duty to inspect or supervise stevedoring operations[1] and has gone on to point out that safety in such operations is "a matter of judgment committed to the stevedore in the first instance"[2].

Here the admittedly customary practice was followed without the slightest indication it was an unsatisfactory

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[1] *Scindia Steam Navigation Co. v. De Los Santos,* No. 79-512, slip op. at 11 (U.S. Sup.Ct. April 21, 1981).

[2] *Id.,* at 18.

one[3] and the longshoremen tripped on a cargo net in the process. The Court has said in *Scindia* that the owner has no liability for injury from "dangers unknown to the owner and about which he had no duty to inform himself"[4]. It is true, of course, that the vessel was aware of the practice followed here. But there is no indication the owner knew of any danger, as distinct from knowing of the use of nets.

This Court has also said in *Scindia* that an owner with knowledge of a practice so obviously improvident that the owner should realize it presented an unreasonable risk of harm to the longshoreman may have a duty to intervene, but there is no suggestion in the lower court's memorandum (Appendix I to Petition for Certiorari), nor indeed anywhere in the record, that this possibility existed here.

Accordingly we submit that the writ should be granted and the case remanded to the Court of Appeals for reconsideration in light of this Court's decision in *Scindia*.

Respectfully submitted,

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[3]*See:* Statement of the Case, Petition for Certiorari, at 3.

[4]*Scindia v. De Los Santos, supra,* Note 1, at 15.

No. 80-745

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WILLIAM V. McMICHAEL,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Should certiorari to the Ninth Circuit be granted in a longshoreman's personal injury case where the shipowner-petitioner failed to except to the trial court's instructions on negligence or having excepted failed to assign error brief or argue the court's instructions?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

ORIENTAL STEAMSHIP CORPORATION,
Petitioner,

v.

WILLIAM V. McMICHAEL,
Respondent.

RESPONSE TO PETITION FOR
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Respondent prays that the court deny the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, first entered in this case June 25, 1980, as to which rehearing was denied August 13, 1980.

COUNTERSTATEMENT OF THE CASE

Petitioner erroneously states that plaintiff, a longshoreman, is seeking

damages "in addition to his worker's compensation benefit". Plaintiff-respondent will be required to repay to the compensation carrier 100% of the funds paid to him or on his behalf ($35,483.76) without deduction for pro rata attorneys' fees or costs. Bloomer v. Liberty Mutual Ins. Co., 445 U.S. 74 (1980).

Admitted fact 3 of the Pretrial Order (TR 34) which was incorporated in a stipulation of fact and submitted to the jury as "Stipulation of Facts Exhibit 8" conclusively sets the factual background of respondent's (longshoreman) claim against petitioner (shipowner) for negligence resulting in severe personal injuries to respondent.

> On the evening of November 2, 1973, the M/V GOLDEN ROD was moored portside to Weyerhaeuser Dock in Tacoma on navigable waters of the United States. During the evening shift the longshoremen covered up the No. 2 and No. 3 hatches of the

> vessel. The defendant, following a common practice on vessels such as the GOLDEN ROD, required that the hatches be covered in the following manner: After the holds were filled with logs, the longshoremen put the pontoon hatch covers in place. They then laid out three tarpaulins on top of the pontoons. Next, they laid sheets of plywood on top of the tarpaulins. Finally, they laid cargo nets on top of the plywood. The purpose of laying the tarpaulins over the hatch covers is to prevent water from leaking into the holds. The purpose of laying the plywood and cargo nets over the tarpaulins is to protect the tarpaulins from damage, when the slings are pulled from the loads of logs placed on the hatches. Longshoremen commonly step from one hatch to another to finish laying out a tarpaulin, on log ships like the GOLDEN ROD. Plaintiff was injured while assisting in the placement of tarpaulins on the No. 2 cargo hatch when he fell in the well between No. 2 and No. 3 hatch and injured his right knee.

(Ex. 8, R. 34.)

Respondent alleged that the shipowner was negligent because the shipowner required the stevedore to use cargo netting on the hatches, when it knew or should have

known of the severe tripping hazard created. Respondent also alleged the shipowner was negligent in failing to provide adequate lights in the work area.

The petitioner denied negligence and alleged respondent was contributorily negligent.

At the conclusion of the respondent's case (TR 205 to 303), petitioner moved for a directed verdict (TR 303) asserting as it did on appeal to the Ninth Circuit that the shipowner's practice of requiring the placing of nets on the tarps was "customary"--"serves a valuable purpose" and "did not create an unreasonable risk of harm" as a matter of law (TR 303). Petitioner further argued that "the social value" of having the "ship stay alive against the possibility of a person tripping on that would be such that it does not create an unreasonable risk of harm."

The court denied the motion stating:

> I will deny the motion. I think it is a jury question. If it had been established this is the only way to do it, then there should be some question, but there is proof they could have done it another way.

(TR 304-5.)

At the conclusion of all the evidence (when viewed in the light most favorable to the respondent) the testimony was unanimous that the netting provided a severe tripping hazard; the evidence was in conflict on alternate safe methods available to the shipowner but there was no evidence to support respondent's assertions as to the overriding hazard to the vessel if the required net method were not used. The evidence was undisputed that lighting conditions were bad and it was the shipowner's responsibility to light the work area.

Petitioner rested and moved for a directed verdict (TR 367). Respondent

moved for a directed verdict on the issue of contributory negligence (TR 367). The court denied both motions on the ground that the testimony and exhibits established a jury question on the issue of negligence and contributory negligence (TR 367, 368).

Before excepting to the instructions, this colloquy took place:

> THE COURT: All right. Mr. Sullivan.
>
> I might say that in studying the instructions and the law, it seems to me that this case finally boils down to really an argument upon simple negligence, negligence in both aspects.
>
> MR. SULLIVAN (shipowner's lawyer): I believe the Court is correct in that viewpoint.
>
> THE COURT: All right.
>
> The Court then instructed on "simple negligence".

On appeal to the Ninth Circuit, petitioner-shipowner did not assign error to the court's instructions or the failure

to give any of respondent's requested instruction. Rather petitioner defined the issue presented to the Ninth Circuit as follows:

> The issue presented for review is whether there was evidence from which the jury could infer that the use of the netting created an unreasonable risk of harm to the longshoremen.
>
> The defendant charterer contends that the interest which society has in protecting a ship from leakage of water into its holds so far outweighs the interest society has in protecting a longshoreman against possible tripping, in these circumstances, that the court can say as a matter of law and should say that the use of the netting does not create an unreasonable risk of harm. The district court erred when it ruled that this was an issue which could only be decided by the jury. . . .

(Brief of appellant shipowner at 1, 2.)

The Ninth Circuit affirmed, citing Santos v. Scindia Steam Navigation, 598 F.2d 490 (9th Cir. 1979), cert. granted May 1980, but in its six-paragraph memorandum opinion did not address the issue of the

shipowner's failure to assign error to the trial court's instructions.

ARGUMENT AGAINST GRANTING CERTIORARI

If this case raised any legal issues in common with Santos v. Scindia Steam Navigation Co., supra, or any other longshore case for which certiorari now is pending, we would not oppose granting certiorari. However, nowhere in the appellate brief to the Ninth Circuit is there raised an issue concerning the standard of care or the definition of negligence under 33 U.S.C. § 905(b), or any other issue raised in Santos.

The standard of care and the definition of negligence under 33 U.S.C. § 905(b) was only addressed in the trial court by the court's instructions. In its brief to the Ninth Circuit, petitioner did not mention, let alone assign error to, brief or argue the trial court's instructions.

Neither did it assign error to brief or argue the trial court's refusal to give defendant's requested instructions. By this failure, petitioner has waived any objection to the court's instructions or refusal to give its proposed instructions; any argument based on the instructions or proposed instructions is deemed abandoned. E.g., Trailmobile v. Whirls, 331 U.S. 40, 50 (1947); Ortega Cabrera v. Municipality of Bayaman, 562 F.2d 91, 102 n.10 (1st Cir. 1977); United States ex rel. Greenhalgh v. F.D. Rich Co., 520 F.2d 886, 890 n.4 (9th Cir. 1975); Kletschka v. Driver, 411 F.2d 436, 446-7 (2d Cir. 1969); Smith v. American Guild of Variety Artists, 368 F.2d 511, 514 (8th Cir. 1966), cert. denied, 387 U.S. 931 (1967). The Supreme Court will not ordinarily consider an issue neither presented to nor considered by the court of appeals. E.g., United States v.

Lovasco, 431 U.S. 783, 789 n.7 (1977); Cort v. Ash, 422 U.S. 66, 72 n.6 (1975); United States v. Ortiz, 422 U.S. 891, 898 (1975); Bivens v. Six Unknown Named Agents, 403 U.S. 388, 397-8 (1971); Neely v. Martin K. Eby Construction Co., 386 U.S. 317, 330 (1967).

The only issue raised in the trial court and before the court of appeals by respondent's motions for a directed verdict, for a new trial and for a judgment notwithstanding the verdict was whether or not there was sufficient evidence to sustain the verdict. Since petitioner has waived any objection to the trial court's instructions, the sufficiency of the evidence must be weighed against those instructions. The evidence adequately, if not overwhelmingly, supported the jury verdict. Of itself, the issue of the sufficiency of the evidence raises no important question of federal law.

In the present posture of this case, because of petitioner's failure to raise the issue of the standard of care before the court of appeals, this court's decision in Santos will have no effect on the determination in this case. The petition for writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent

No. 80-745

FEB 26 1981

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

ORIENTAL STEAMSHIP CORPORATION,
Petitioner,

vs.

WILLIAM V. MCMICHAEL,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION

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Whether Respondent's description of the procedural background of this case is accurate, or whether the issue set forth in the Petition was ever previously argued, is irrelevant, since the lower court expressly applied the duty standard of the *Santos* case[1] as the sole legal authority for

[1]Santos v. Scindia Steam Navigation Co., Ltd., 598 F.2d 480 (9th Cir. 1978), *cert. granted*, Scindia Steam Navigation Co. v. De Los Santos (No. 79-512).

its decision.[2] It is Petitioner's contention that in so doing the court committed error. To correct this error, it is respectfully submitted that the petition for certiorari should be granted.

Respectfully submitted,

GRAYDON S. STARING

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[2] "Under the standard of negligence adopted by this circuit for purposes of actions brought under 33 U.S.C. § 905(b), the ultimate determination remains one of reasonable care. *Santos v. Scindia Steam Navigation*, 598 F.2d 480 (9th Cir. 1979), *cert. granted* May 1980." Appendix to Petition at A-2.